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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. ~~797~~ 85

CITIES SERVICE GAS COMPANY, a Corporation,
Appellant,

VERSUS

STATE CORPORATION COMMISSION OF KANSAS, HARRY SNYDER, JR., Chairman, RICHARD C. BYRD and JOHN I. YOUNG, as Members of Said Commission, and Their Respective Successors in Office,
Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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April, 1957.

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APPELLEES' CONTENTIONS ARE FRIVOLOUS

Appellees' motion to dismiss this appeal or in the alternative to affirm the final judgment of the Supreme Court of Kansas, and their brief in support thereof, are based upon a false premise and clearly frivolous. The position taken by appellees is a sham because it assumes, contrary to the record, that the state court based its decision and judgment on an adequate non-federal basis and determined

the minimum gas price-fixing order of Commission under attack in this appeal did not apply to appellant or its operations in the purchase of gas in the Kansas Hugoton Gas Field. Even a cursory examination of the decision of the Supreme Court of Kansas, *Cities Service Gas Company* v. *State Corporation Commission of Kansas, et al.*, 180 Kan. 454, 304 P.2d 528, will disclose that the only question presented to that Court was a federal question. The opinion of the Court concedes this to be true. It said:

> "the sole question presented on appellate review is, that in the light of the *facts and circumstances of record*, the Commission had no jurisdiction to issue the minimum value attribution and/or price order in question because the sole and exclusive jurisdiction to make such order is vested in the Federal Power Commission under the Natural Gas Act (15 U.S.C.A. 717)" l.c. 459.

The undisputed *facts and circumstances of record* referred to by the Court in its opinion reveal that the only operations of appellant in the field were confined exclusively to sales of gas to it by producers therein, delivered at the wellhead and also at its pipeline in the field after production and gathering had ended, for immediate transportation and resale in interstate commerce for ultimate public consumption. It was not a producer in the field. l. c. 459.

On these facts and circumstances of record showing the operations of appellant in the field, the Kansas Supreme Court affirmed the judgment of the Finney County District Court. By Statute in Kansas, G. S. 1949, 20-203,211 and 60-3329, the syllabi of the Court constitutes the law of the case.

Syllabi 2, 3, 4 and 5 of the Kansas Supreme Court in the case at bar, read:

"2. The provisions of the statute mentioned in the first paragraph of this syllabus give the State Corporation Commission power and authority to make an order fixing a *minimum wellhead price* for natural gas *taken* from a common source of supply, as a condition precedent for withdrawal of the gas from such common source of supply, when—as here—*the evidence before the Commission* warrants its conclusion such an order is necessary in order to prevent waste and to secure the relative rights of owners of real property from which such gas is produced from the common source of supply (Following *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 222 P.2d 704).

"3. A conservation order of the State Corporation Commission, similar to the order referred to in paragraph two of the syllabus, construed as meaning that from and after the effective date of such order *no person*, firm or corporation—*first* of all the producer—can lift or take gas in its natural state from the depths of the Hugoton Gas Field in Kansas to a *point further than the wellhead* without, as a condition precedent to its withdrawal, first attributing thereto the minimum price prescribed by the terms of such order.

"4. In the light of the *facts of record* and with *the order construed as set forth in paragraph three of the syllabus* it is held that such order falls squarely within the excluding provisions of the Natural Gas Act [15 U.S.C.A. § 717(b)] providing that the terms of such Act do not apply to the production of natural gas.

"5. The record further examined, and it is held, that *under the facts, conditions and circumstances set forth at length in the opinion*, the trial court did not

err in its judgment upholding and sustaining the order of the Commission as a lawful and reasonable order."

Further evidence of the fact that the Kansas Supreme Court passed upon the validity of said minimum gas price-fixing order as applied to the operations of appellant in its purchases of gas in the field is clearly reflected by appellant's petition for a judicial review specifically authorized by G. S. Kan. 1949 55-606, 55-707. (Appellant's Jurisdictional Statement, Appendices E and D, respectively). Such petition discloses that appellant plainly alleged and the evidence so substantiates (Jurisdictional Statement, pp. 5-10), it was during all times material to the case:

> "a natural gas company as defined in the Natural Gas Act, as amended (15 U.S.C.A. 717), and engaged generally in the business of producing and purchasing natural gas for transportation and sale in interstate commerce for resale under the provisions of said Act, etc." (R. 31).

It further alleged:

> "As applied to the operations of plaintiff (Cities Service Gas Company) as evidenced by the record, there exists in the Commission no jurisdiction or authority to promulgate and issue said minimum gas price order" (R. 33).

The District Court by its judgment (R. 99) "upheld and sustained" said price-fixing order. The question is upheld and sustained as applied to what—to the operations of appellant in its purchases of gas in said field, of course. This was the issue before the Court.

On appeal, the Supreme Court of Kansas ruled:

> "The conclusions heretofore announced require that the *judgments be affirmed.* It is so ordered" l. c. 464.

The question is again presented, judgment affirmed as to what? Again, the answer is affirmed as applied to the operations of appellant in its purchases of gas in the field. No court, either state or federal, sits to give an opinion on abstract propositions.

If further proof of the fact the Court held that the order applied to appellant and its operations is necessary, attention is directed to the trial court's judgment upholding and sustaining the order. At the trial in the District Court, appellees filed a motion to dismiss appellant's action for judicial review (R. 98). If appellees' argument as here presented were correct the trial court would have sustained the motion and dismissed the action on the ground appellant was not aggrieved and the order did not apply to it or its operations. The motion to dismiss was denied (R. 98). No cross-appeal was taken to the Kansas Supreme Court from the ruling of the court denying such motion to dismiss. (G. S. 1949, 60-3314). The trial court's ruling is therefore final; *Giltner* v. *Stephens*, 163 Kan. 37, Syl. 4, 180 P.2d 288. The result is the price-fixing order here involved has been finally judicially determined to be applicable to appellant and its operations in the purchase of gas in said field.

NO STATE QUESTION IS INVOLVED IN THIS APPEAL

Every lawyer with any experience at the bar recognizes that where a statute or order of a State Commission having the force of a statute is before the court for consideration, it must be interpreted and construed as applied to the facts and circumstances shown by the record if the order or statute is ambiguous. If it is not ambiguous, there exists no room for construction or interpretation. In the second syllabus, the Kansas Supreme Court determined that the Commission had authority under the Kansas Statutes to promulgate such minimum wellhead price-fixing order. In so doing, it specifically followed and based its decision on *Kansas-Nebraska Natural Gas Company* v. *State Corporation Commission*, 169 Kan. 722, 222 P.2d 704. An examination of that case together with *Columbia Fuel Corporation* v. *Panhandle Eastern Pipe Line Company*, 176 Kan. 433, 271 P.2d 773, clearly shows that under an 8 cents per m.c.f. price-fixing order which is in substance and legal effect the same as the order now before this Court, it was determined that the purchaser of gas was required to pay to the producer not only the minimum price fixed by the order, but in addition thereto the costs of gathering the gas where the producer sold to the pipeline company the gas in the field after the production and gathering thereof had been completed.

Your attention is further directed to appellant's motion for rehearing in the instant case (R. 130) wherein it specifically asked that Court to clarify its decision and inform appellant its obligations, if any, under the order and answer

the federal question presented. The motion for rehearing reads:

> "Unless this Court grants to Appellant a rehearing in this case and, upon such rehearing or otherwise, answers the federal questions presented, and clarifies and determines the applicability of said minimum price order as applied to the undisputed operations of Appellant in its purchases of natural gas in said field, then Appellant is forced to and will assume this Court has decided that said minimum price order of Commission does apply to the undisputed operations of Appellant, and Appellant is required to pay to the producer as a condition precedent to its taking and purchasing of the gas, the minimum price fixed by said order, regardless of whether such sales of gas to it in interstate commerce for resale are made at the wellhead, *after production has ceased*, or in the field, *after production and gathering has ended*" (R. 132-133).

The motion of appellant for rehearing was promptly denied, without opinion (R. 137). It, therefore, seems to be well established that for the purpose of this appeal the price order of the Commission, as interpreted by the Supreme Court of Kansas, applies to all sales of gas in interstate commerce for resale, whether made at the wellhead or in the field after production and gathering thereof have been completed. Further, that this appeal squarely presents a federal question, as set forth on page 4 of appellant's Jurisdictional Statement, and no state question is involved.

In *Atchison, Topeka & S. F. R. Co.* v. *Public Utilities Commission*, 346 U.S. 346, 74 Sup. Ct. 92, 98 L. Ed. 51, this Court said:

"These cases present the same questions of law and will be disposed of together. The Public Utilities Commission of California entered orders authorizing the construction of certain grade separation improvements and allocating the costs therefor, pursuant to § 1202 of the Public Utilities Code of California. On petitions to the Supreme Court of California, that court denied review of the Commission's orders, and these appeals followed. We postponed jurisdiction until a hearing on the merits.

"We think the Commission's orders must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 USC § 1257(2). *Live Oak Water Users' Asso.* v. *Railroad Com.* 269 U. S. 354, 356, 70 L. Ed. 305, 308, 46 S. Ct. 149; *Lake Erie & W. R. Co.* v. *Public Utilities Com.*, 249 U.S. 422, 424, 63 L. Ed. 684, 687, 39 S. Ct. 345. The Commission has construed § 1202 as authorizing these orders. *The appellants presented squarely to the Supreme Court of California their contention that in the allocation of costs these orders take their property without due process of law and are so arbitrary and burdensome as to constitute an interference with interstate commerce, in violation of the Constitution of the United States.* In sustaining the Commission's orders by denying writs of review, the Supreme Court of California *upheld the statute as applied by the Commission, and the cases are properly here on appeal. Kansas City S. R. Co.* v. *Road Improv. Dist.*, 256 U.S. 658, 660, 65 L. Ed. 1151, 1156, 41 S. Ct. 604" l. c. 347-349.

Assuming, *arguendo*, that there is a non-federal ground involved in this appeal, this Court has determined that such ground must be independent of the federal question. In *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U.S. 157, 164, 61 L. Ed. 644, it is said:

"Where the non-federal ground is so interwoven with the other as not to be an independent matter, * * * our jurisdiction is plain."

This Court has said further that the non-federal ground must be a tenable one; in other words, a review by this Court cannot be evaded by a non-federal ground

"so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District* v. *Farmers Mutual Canal Company, supra,* 164.

Even if it be conceded, which appellant does not, that there is a non-federal question involved, it is apparent that where the federal and non-federal questions are so interwoven, not because of their intrinsic relationships but because of the state court's failure to separate them clearly, this Court will not either dismiss the appeal or affirm the judgment, but will remand the case to the state court in order that the situation may be clarified. *Minnesota* v. *National Tea Company,* 309 U.S. 551, 555, 60 Sup. Ct. 676, 84 L. Ed. 920, and cases there cited.

It would seem, however, in view of the Kansas Supreme Court's handling of appellant's motion for rehearing, that remanding the case to it for further consideration would be a useless procedure.

APPELLANT IS AGGRIEVED BY THE PRICE ORDER

G. S. 1949 55-606, 707, the statutes under which appellant sought a judicial review of Commission's gas price-fixing order, specifically provide:

"Such action may be brought *by any person aggrieved*, etc."

On page 26 of their brief, appellees assert:

"The only conceivable way in which Appellant might be affected by the order is through the effect of the order upon others with whom Appellant deals."

Even if it be assumed, as contended by appellees, that the order is directed only to producers, and not to appellant or its operations, appellant is still aggrieved by such order and the decision and judgment of the Supreme Court of Kansas upholding and sustaining the same. On page 5 of appellant's Jurisdictional Statement it is shown that appellant is purchasing gas in the field under long term contracts at prices substantially lower than that fixed by the Commission's price order. If the producer is prohibited from producing gas unless he receives the 11 cents per m.c.f. price fixed by Commission's order, it is clear that appellant's purchases of gas in the field are directly and adversely affected. This is particularly true when the severe penalties prescribed by statute for a violation of Commission's orders are considered. G. S. 1949 55-708, 709, 710. In *American Power & Light Company* v. *Securities & Exchange Commission*, 325 U.S. 385, 65 Sup. Ct. 1166, 89 L. Ed. 1683, this Court had occasion to consider when a person is aggrieved. On page 388 of the opinion, it is said:

"We hold that a stockholder having a substantial financial or economic interest distinct from that of the corporation which is directly and adversely affected by an order of the Commission, irrespective of any effect the order may have on the corporation, is a 'per-

son aggrieved' within the meaning of Section 24(a)." Compare *Columbia Broadcasting System, Inc.* v. *U. S. of America, et al.*, 316 U.S. 407, 422-423, 62 Sup. Ct. 1194, 86 L. Ed. 1563.

It is apparent, therefore, that if the producer must receive 11 cents per mc.f. for his gas before he can sell it, then if appellant is to receive the gas from the producer under the contract, he must pay the producer therefor the 11 cents per m.c.f. prescribed by the order.

In *Columbia Broadcasting System* v. *United States, et al., supra*, this Court said, on page 422:

> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the *regulations are not directed to Appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely Appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked*" (Citing cases).

The truth is that appellant is aggrieved and directly affected by the order. If it does not pay the price prescribed by the order, then Commission, under G. S. 1949, 55-709, may shut off its gas supply for its interstate commerce operations and thereby cause a breach of the gas purchase contracts and impede and burden the interstate operations of appellant as to such sales of natural gas for resale here involved.

APPELLEES' ENTIRE BRIEF IS A SUBTERFUGE TO EVADE THE PROVISIONS OF THE NATURAL GAS ACT AS INTERPRETED BY THIS COURT

On page 41 of appellees' brief, it is asserted:

> "If the law were well settled in appellant's favor, it would not have felt compelled to misrepresent and ignore the actual nature and impact of the Kansas order in its presentations here."

It is indeed unfortunate that counsel for appellees have made such accusations, particularly, when such are not the truth and are wholly unsupported by the record.

Appellees place stress on a purported order of the Commission set forth in Appendix D of its brief in support of its motion to dismiss or affirm, wherein it is claimed that the Commission held the order was not directed to appellant.

The Commission's claimed interpretative order is set out in Appendix D to appellees' brief and is not in the record designated and filed with the Clerk of this Court. Neither will it be found in the abstracts of the record before the Supreme Court of Kansas. The Opinion of the Supreme Court of Kansas in the case at bar does not disclose that such Court took judicial notice of the proceedings set forth in Appendix D. As a matter of fact, the proceedings referred to as Appendix D to appellees' brief are now pending undetermined on judicial review in the District Court of Finney County, Kansas. The Opinion of the Supreme Court of Kansas in the case

at bar, 1.c. 463, does disclose that appellees burdened the record before that Court with Volume II of a counterabstract which the Court said "was unwarranted." That same unwarranted record has been designated by appellees and included in the record before this Court (R. 408-635). Appellees concede in their brief that appellant is not attacking the sufficiency of the gas price-fixing order as a conservation measure. The Kansas Supreme Court in its Opinion, 1.c. 460-461, said:

> "Finally it can be stated that, in as much as Appellants have abandoned all questions involved in the court below, except the jurisdictional one heretofore mentioned, we must and do assume, the evidence before the Commission was sufficient to sustain its findings to the effect the involved order, upheld and sustained by the trial court, was necessary and required in the interest of conservation and prevention of waste of gas in the Hugoton Field."

It is, therefore, clear that the order as a conservation matter is not an issue before this Court and, therefore, all of the record designated by appellees and contained in Volume I of its Counterabstract (R. 141-408) is also "unwarranted."

Even assuming the order is interpreted as Commission contends, which appellant does not concede, the plain fact remains that appellees presented such asserted construction to the Kansas Supreme Court. On page 461 of the Kansas Supreme Court's Opinion (p. XI, Appendix A, Appellant's Jurisdictional Statement) the Court said:

> *"We are not inclined to labor arguments made by the parties respecting the construction to be given the order.* It suffices to say, that after a careful analysis thereof, we have no difficulty in construing its terms

to mean that *no person, firm or corporation—can lift or take* gas in its natural state from the depth of the Hugoton Field *to a point further than the wellhead* without, as a condition precedent to its withdrawal from the common source of supply, first attributing thereto a minimum price of not less than eleven cents per M.c.f. (14.65# p.s.i.a.). So construed, recognizing as we must that under our own decisions (citing same) as well as those of the highest court of the land (citing cases) the Commission has power to regulate the physical production and gathering of natural gas in the interest of conservation, including the protection of correlative rights and the prevention of waste, *the involved order falls squarely within the hereinafter emphasized excluding provisions of the natural Gas Act (15 U.S.C.A. § 717[b], etc.).*"

This case is before this Court on the decision and judgment of the Supreme Court of Kansas and not upon a purported order of the Commission made during the pendency of the case in the Kansas Supreme Court, which order, as is heretofore pointed out, has never become final and is now pending undetermined on judicial review in the District Court of Finney County, Kansas. The Kansas Supreme Court's interpretation of the order must be accepted by this Court, if it is not ambiguous. Where the interpretation of a court of competent jurisdiction has become final, Commission's interpretation contrary thereto is "without force." *Miller* v. *Standard Nut Margerine Co.*, 284 U.S. 498, 508, 52 Sup. Ct. 260, 76 L. Ed. 422, 429. It is clear, therefore, Commission's purported interpretative order is without any force or effect in law.

The Court will note from the record (R. 52) that the Wichita counsel for appellees in this appeal are the same

counsel who initiated the proceedings before the Corporation Commission leading to the promulgation of the minimum gas price-fixing order here involved. After the issuance of the order and the filing of the judicial review proceedings by appellant in the District Court of Finney County these same counsel for the Southwest Kansas Royalty Owners Association became counsel for the Commission in this case in the Finney County, Kansas District Court (R. 101). They continued as such counsel in the Kansas Supreme Court (Appellant's Jurisdictional Statement, Appendix A). While this case was still pending in the Kansas Supreme Court and such counsel were still representing Commission they filed, on behalf of J. F. Austin and the Southwest Kansas Royalty Owners Association, the proceedings set forth in Appendix D to Appellees' Motion to Dismiss or Affirm (Appendix D, p. LIV).

Appellant, in the light of this indisputable situation, asserts that the proceeding evidenced by said Appendix D is plainly a rigged proceeding for the sole and exclusive purpose of evading the single Federal Question and the force and effect of this Court's recent decisions construing the Natural Gas Act and determining the jurisdiction of the Federal Power Commission thereunder of such sales of gas as are involved in this case. The entire brief of appellees is clearly a subterfuge and, under Rule 40(5) of this Court, should be stricken and rejected.

As a matter of fact, all that is necessary for this Court to read and consider in determining this appeal is the decision, opinion and judgment of the Supreme Court of Kansas set forth in Appendix A to Appellant's Jurisdictional Statement, together with Appellant's Motion for Re-

hearing (R. 129), the Court's denial thereof (R. 137) plus, if desired, the first 140 pages of the record filed with the Clerk of this Court. All other matters injected by appellees into the record and their brief are in violation of Rule 40(5) of this Court and constitute burdensome, irrelevant, immaterial and scandalous matter, and should be disregarded and stricken by this Court.

In *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, 340 U.S. 179, 71 Sup. Ct. 215, 95 L. Ed. 190, this Court determined that in the absence of the provisions of the Natural Gas Act, a state, as against constitutional objections, could fix a minimum price for natural gas produced and sold for resale in interstate commerce, as a conservation measure. However, in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, 74 Sup. Ct. 794, 98 L. Ed. 1035, and *Natural Gas Pipe Line Company of America* v. *Panoma Corporation, et al.*, 349 U.S. 44, 99 L. Ed. 866, this Court determined as reflected by its opinions that in the face of the provisions of the Natural Gas Act and the jurisdiction of the Federal Power Commission thereunder,

> "such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission."

which includes wellhead sales of gas in interstate commerce for resale. The sales of gas involved in this case are not only sales of gas for resale in interstate commerce made at the wellhead, but also as determined by this Court in the *Natural Gas Pipe Line Company* case, *supra*, are sales of natural gas made,

"after its production and gathering has ended, by a company which transports gas for resale in interstate commerce."

The record, the cases and the absolute reversal of position, as evidenced by appellees' brief, clearly establish that the purpose of counsel for appellees is not to challenge the jurisdiction of this Court or answer the single federal question presented by this appeal, but to evade the force and effect of this Court's decisions construing the Natural Gas Act and defining the jurisdiction of the Federal Power Commission thereunder.

APPELLANT IS A TAKER OF GAS FROM THE FIELD

The order of the Kansas Commission under attack in this case plainly states:

"All * * * *corporations* which *take* gas *or cause* gas *to be taken* from the Hugoton Gas Field in Kansas, * * * *shall* as a condition precedent for withdrawal from the common source of supply, *pay* or attribute to all gas taken, * * * *for all purposes including payments to producers, * * * the fair and reasonable minimum price of not less than eleven cents (11¢) per Mcf.*" Appellant's Jurisdictional Statement, p. 4, Appendix C, xxix.

The Dictionary definition of "take" includes "to buy." As used in the oil and gas industry, a taker is defined as

"Any person, who, acting alone, or jointly with any person or persons, is directly or indirectly purchasing or transporting by any means whatsoever or otherwise

removing oil or gas from any common source of supply."

Manual of Oil and Gas Terms, Annotated, by Williams & Meyers, 1957, p. 249.

The price fixing order here involved clearly shows on its face it is applicable to appellant and its operations in the purchase of gas and specifically provides that *all corporations which* take gas or cause gas to be taken from the Hugoton Field *shall,* as a condition precedent for withdrawal, *pay* or attribute to all gas taken *"including payments to producers"* the *specified* minimum *price* of not less than *11¢ per Mcf.* Certainly the producer cannot pay himself and thus attribute a value. It follows that the payment to the producer as required by the order means payment by the purchaser, in this case appellant. From what has been said in this brief, it is apparent that the Kansas Supreme Court affirmed the judgment of the Finney County District Court upholding and sustaining the price order, not on the fallacious argument made by appellees, but on the ground that such price order was a conservation measure and as such fell:

> *"squarely within the excluding provisions of the Natural Gas Act (15 U.S.C.A. 717[b]) providing that the terms of such Act do not apply to the production of natural gas"* (Syllabus 4 of the Court's Opinion).

APPELLANT'S MOTION TO REVERSE JUDGMENT SHOULD BE SUSTAINED

Appellees, on page 41 of their brief, indicate a summary disposition of this case by sustaining appellant's motion to reverse the final judgment

"would be most inappropriate, particularly in view of the unanimous opinion of the Supreme Court of Kansas containing a well reasoned analysis of the decisions of this court and recognizing their controlling effect."

That such is not the case is evidenced by the recent *per curiam* opinion of this Court in *Holmby Productions, Inc., et al.* v. *Mrs. Frances Vaughn, et al.*, 350 U.S. 870, 76 Sup. Ct. 117, 100 L. Ed. 770, where this Court by *per curiam* opinion, found that the Kansas Supreme Court's judgment was clearly erroneous and summarily entered an order and judgment, "judgment reversed", citing authorities to support its decision. It is sincerely asserted that such an order and judgment are appropriate in this appeal in view of the uncontradicted facts of record and the law as recently clearly established by this Court.

Respectfully submitted,

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